Nos. 03-1238 & 04-66

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC., D/B/A/ BARBER FOODS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN TUM V. BARBER FOODS (No. 04-66) AND IN SUPPORT OF RESPONDENTS IN IBP V. ALVAREZ (No. 03-1238)

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 58 national and international labor organizations with a total membership of approximately 13 million working men and women, files

this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

These two cases were brought by employees of meatpacking industry employers claiming overtime wages under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 20 *et seq.* for the time the employees spent in donning and doffing required personal protective equipment and sanitary garb and for the time spent walking from the plant's donning locations to the plant's killing or cutting floor and from the killing and cutting floors to the plant's doffing locations.

"[M]eatpacking is one of the most dangerous industries in the United States." GAO-05-96, "Safety and Health of Meat and Poultry Workers," pp. 1 & 7 (Jan. 12, 2005), available at: http://www.gao.gov/new.items/d0596.pdf ("GAO Rep."). In order to ameliorate these dangers, meat and poultry processing employees (hereinafter meat processing employees) are required to don an array of personal protective equipment at their plant before the employees proceed to the plant's killing cutting floor. *See* 29 C.F.R. § 1910.32 (a) (OSHA standard requiring "personal protective equipment . . . . wherever it is necessary by reason of hazards of processes or environment"). Virtually all such employees are required to don personal protective equipment such as hard hats, safety goggles or face shields, earplugs, back belts, steel-toed boots, and vinyl aprons and gloves. *IBP v. Alvarez* (No. 03-1328), Pet. App. 4a n. 2 & 39a; *Tum v. Barber Foods* (No. 04-66), Pet. App. 3a-4a & 23a-25a. In addition, the employees who handle knives or other sharp implements are required to don a variety of equipment made of chain-linked metal, including

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

mesh aprons, leggings, vests, sleeves and gloves. *Alvarez* Pet. App. 4a n. 2 & 39a-40a.[2]

Meatpacking also implicates the public health, requiring that the slaughtering and butchering take place in sanitary conditions. All meat processing employees are therefore required by U.S. Department of Agriculture regulations to don a variety of sanitary garb, most particularly sanitary hair nets and smocks at the plant before the employees proceed to the plant's killing or cutting floor. *See* 9 C.F.R. § 416.5. *Alvarez* Pet. App. 39a; *Tum* Pet. App. 23a.

Much of the personal protective equipment must be stored, donned and doffed at the plant. *Alvarez* Pet. App. 3a-4a, 39a; *Tum* Pet. App. 4a. Many of the items must be cleaned at the plant of animal blood and fat at the end of the workday in order to be made ready for future use; the items made of chain-linked metal are, in any event, too unwieldy to be worn away from the plant. *Alvarez* Pet. App. 3a, 41a-42a.

All of the sanitary garb is maintained by the meatpacking employer; is provided by the employer to the meat processing employees and then donned at the plant; and is doffed at the plant and returned to the employer at the end of the workday. *Alvarez* Pet. App. 39a-40a; *Tum* Pet. App. 25a. USDA regulations require that meat processing employees don clean sanitary garb at the start of each day and that the garb be maintained in a sanitary condition throughout the day. 9 C.F.R. § 416.5(b). The employees are generally required to remove their sanitary garb before leaving the killing or cut-

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[2] The *Tum* case presents the somewhat atypical situation of a secondary poultry processing plant where boneless chicken breasts are dressed and packaged for shipment to retail outlets. *Tum* Pet. App. 21a. For the more typical situation of a plant where live chickens are slaughtered and butchered, see pages 5-9 of the Magistrate Judge's Report and Recommendation (Feb. 14, 2001) in *M.H. Fox, et al. v. Tyson Foods, Inc.*, Case No. CV-99-TMP-1612-M (N.D. Ala.), available at https://ecf.alnd.uscourts.gov/ cgi-bin/DktRpt.pl?84138.

ting floor and to re-don the garb again when they return to the floor. *Alvarez* Pet. App. 5a, 41a; *Tum* Pet. App. 28a.

SUMMARY OF ARGUMENT

I. The question common to both the *Alvarez* case and the *Tum* case is whether § 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), privileges the employers here to treat their employees "post-donning-of-required-personal-protective-equipment-and-sanitary-garb" walking time from the plant's donning locations to the plant's killing or cutting floor and the employees' "pre-doffing" walking time from the killing or cutting floor to the plant's doffing locations, as noncompensable under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* The answer to that question is "no."

The Portal-to-Portal Act embodies Congress' judgment: (i) that the employer's noncompensation privilege stated in § 4(a) is to apply only to employee activities that take place either *prior to the commencement* of the employee's "workday" or *subsequent to the conclusion* of that "workday;" and (ii) that this § 4(a) employer noncompensation privilege is *not* to apply to employee activity during the "workday" proper. Section 4(a) so states in clear and unambiguous statutory language; § 4(a)'s legislative history, moreover, makes it plain that what § 4(a) statutory language so clearly states is what Congress intended it to state; and the Department of Labor's Portal-to-Portal Act regulations interpret § 4(a) in strict accord with its plain meaning and with the legislative history materials.

This Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956), in its turn, teaches that the employees here "commence [their] principal activity or activities," §4(a),—and thus begin their workday—when, at the beginning of their shift, the employees engage in the activity at employer-designated plant locations, of donning the personal protective equipment and sanitary garb the employer requires them to

don and that the employees "cease [their] principal activity or activities"—and thus conclude their workday—when, at the end of their shift, they engage in the activity of doffing that required personal protective equipment and sanitary garb at the plant's doffing locations. That being so, the Portal-to-Portal Act does not apply to any of the employees' post-donning/pre-doffing walking activities at the plant—whether it be walking between the plant's donning locations and the plant's killing or cutting floor, walking between places on the killing or cutting floor, or walking between the plant's killing or cutting floor and the plant's doffing locations.

II. The *Tum* case presents the Portal-to-Portal Act question of whether § 4(a) privileges the employer to treat the waiting time spent by its poultry processing employees in obtaining required personal protective equipment and sanitary garb from the employer, and in returning that equipment and garb, in the course of their workplace donning ad doffing activities, as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."

This Court's decision in *Steiner v. Mitchell, supra*, establishes that the FLSA makes compensable "time incident" to an employee workplace activity, like the clothes changing there, that is "an integral and indispensable part of the principle activity for which the covered workmen are employed," *see* 350 U.S. at 248 and 256; *viz.* makes compensable the time the employee spends taking the steps necessary to accomplishing that work-place activity task. And, the employee waiting time in obtaining and returning required personal protective equipment and sanitary garb at issue in *Tum* like the time the employee spends in taking physical possession of the required items and in the physical return of those items is part and parcel of a single necessary step toward accomplishing their workplace donning and doffing activity task. That waiting time is thus compensable "time incident" to that employee workplace activity.

ARGUMENT

I. THE "POST-DONNING AND PRE-DOFFING WALKING TIME" ISSUE

In both *Alvarez* and *Tum*, the meatpacking employer: (i) requires its meat processing employees, at the beginning of their shift, to procure and don particular personal protective equipment and sanitary garb at specified plant donning locations; (ii) requires the fully outfitted employees to walk directly from the plant's donning locations to the plant's killing or cutting floor; (iii) requires the fully outfitted employees at the end of their shift to walk from the killing or cutting floor to the plant's doffing locations; and (iv) requires the employees to doff and turn in the personal protective equipment and sanitary garb that must be cleaned for future use at those doffing locations.

The question common to both cases is whether § 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), privileges the employers to treat the employees post-donning walking time and the pre-doffing walking time at issue here as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."[3]

The Portal-to-Portal Act states—in clear and unambiguous language—Congress' carefully considered judgment: (i) that the employer's noncompensation privilege stated in § 4(a) applies only to employee activities that take place either *prior to the commencement* of the employee's "workday" or *subsequent to the conclusion* of that "workday;" and (ii) that the § 4(a) employer noncompensation privilege does *not* apply to employee activity during the "workday" proper. Section 4(a),

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[3] The *Tum* case also raises a § 4(a) question regarding the compensability of the waiting time the employees spend in the course of donning and doffing this required personal protective equipment and sanitary garb at the plant. We treat briefly with that question in Part II of our argument, *infra*.

by its terms, has no application to employee activities that occur during the period of time that begins when an employee "commences" his "principal activity or activities" on a given day and that continues until the employee "ceases" his "principal activity or activities" for that day. 29 U.S.C. § 254(a).

This Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956), makes it equally clear that the meat processing employees here "commence [their] principal activity or activities"—and thus begin their "workday"—when, at the beginning of their shift, the employees engage in the activity, at employer-designated plant locations, of donning the personal protective equipment and sanitary garb the employer requires them to don and that the employees "cease [their] principal activity or activities"—and thus conclude their "workday"—when at the conclusion of their shift they engage in the activity of doffing that required personal protective equipment and sanitary garb at the plant's doffing locations. That being so, the Portal-to-Portal Act does not apply to any of the employees' post-donning/pre-doffing walking activities at the plant—whether it be walking between the plant's donning location and the plant's killing or cutting floor, walking between places on the killing or cutting floor, or walking between the plant's killing or cutting floor and the plant's doffing locations.

A.(1) Section 4(a) of the Portal-to-Portal Act provides that

> "no employer shall be subject to any liability or punishment under the Fair Labor Standards Act . . . on account of the failure of such employer . . . to pay an employee overtime compensation, for or on account of any of the following activities . . .—
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254 (a).

In sum, the express terms of § 4(a)(1) privilege employers to treat as noncompensable under the FLSA an employee's "activities [of] . . . walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform . . . which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

This statutory text clearly and unambiguously states the following two points with regard to § 4(a)(1)'s scope of application:

- First, § 4(a)(1) *does* privilege employers to treat as noncompensable under the FLSA: (i) employee "walking, riding, or traveling to the . . . [first] actual place of performance of the [employee's] principal activity or activities" at the beginning of the employee's "workday," and (ii) employee "walking, riding, or traveling . . . from the [last such] place of performance" at the end of the employee's "workday."

- Second, § 4(a)(1) does *not* privilege employers to treat as noncompensable under the FLSA, employee "walking, riding, or traveling" between one "actual place of performance of the [employee's] principal activity or activities" and a second "place of [such] performance" which "occurs [subsequent] to the time on any particular workday at which such employee commences [and prior] to the time on any particular workday at which he ceases, such principal activity or activities."

(2) The Portal-to-Portal Act's legislative history makes it plain that what § 4(a)(1) says in this regard is precisely what Congress intended to say. The Senate Report on the provision in the Senate bill that became § 4(a) states:

> "The rule laid down [in § 4(a)] is that activities which take place either prior to the time at the beginning of his workday when [an] employee commences, or subsequent to the time at the end of his workday, when [an] employee terminates his principal activity or activities, are activities (called portal-to-portal activities) which are not compensable except by contract or by a practice or custom not inconsistent therewith." Senate Report No. 48, 80th Cong., 1st Sess. 47 (1947).

In this regard, the Senate Report explains that it "uses the term 'workday' to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform." *Id.*

The Senate Report goes on to note that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof," and reiterates that "the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[] the beginning and the end of his workday." S. Rep. No. 48, p. 48.

To leave no doubt about § 4(a)'s scope of application, the Senate Report, having described what is *within* § 4(a)'s limited reach, describes what is *beyond* § 4(a)'s reach: "Activities of an employee which take place during the workday are . . . not affected by this section and such activities will continue to be compensable or not without regard to the provisions of this section." S. Rep. No. 48, p. 47. And, it follows that "[a]ny activity occurring during a workday will continue to be compensable or not compensable in accor-

dance with the existing provisions of the Fair Labor Standards Act." *Id.* at 48

Each of the Senate bill's primary sponsors re-emphasized the limits of § 4(a)'s reach during the ensuing floor debate:

> • Senator Wiley, who submitted the Report on the Senate bill, explained that "activities occurring within the 'whistle-to-whistle' period are not affected by the Senate bill. Such activities are permitted to be treated as they have been, under the Fair Labor Standards Act." 93 Cong. Rec. 2084 (1947).
>
> • Senator Donnell, the Senate bill's floor manager, stated that "we are not undertaking to legislate in [this section] as to the workday proper; but we are legislating solely with respect to the preliminary activities, before the beginning of the workday, and the postliminary activities, after the conclusion of the workday." *Id.* at 2181.
>
> • Senator Cooper, the third principal sponsor of the bill, explained, "For the period from the beginning of the time of the employee's principal activity, until that principal activity is ended, we do not legislate at all. That area is still under the Wage and Hour Administrator. The rules which have already been developed by the Wage and Hour Administrator and the decisions of the courts still apply to that interval between the commencement of the employee's principal activity and the end thereof." *Id.* at 2297.

Consistent with the foregoing, in presenting to the Senate the conference agreements on the portal-to-portal bill, Senator Wiley reported:

> "Section 4 of the conference agreements relates to future claims and relieves an employer from liability for his failure to pay minimum wages or overtime compensation for activities engaged in outside of the workday, unless such activities are compensable by custom or contract. Activities performed by an employee during the

> workday are not affected in any manner by this bill, and the employer will remain liable or not liable for payment of such activities under the [FLSA] to the same extent as he would be if this bill were not enacted. In other words, they are left under the applicab[le] provisions of law in existence prior to the date of enactment of the Portal-to-Portal Act of 1947." 93 Cong. Rec. 4269.

See also id. at 4388 (where Rep. Gwynne gives a similar explanation of the conference agreements to the House).

In sum, as Senator Wiley put it, "[a]ctivities performed by an employee during the workday are not affected in any manner by [§ 4(a)]," 93 Cong. Rec. 4269, and as the Senate Report explained, the statutory term "workday" is defined "to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform," S. Rep. No. 48, p. 47.

(3) The regulations adopted by the Department of Labor shortly after the enactment of the Portal-to-Portal Act succinctly state the lessons to be drawn from the statutory language and its legislative history.

First, those regulations clearly state that "[p]eriods within the 'workday' [are] unaffected" by the Portal-to-Portal Act:

> "Section 4 of the Portal Act does not affect the computation of hours worked within the 'workday' proper, roughly described as the period 'from whistle to whistle,' and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before 'preliminary' or 'postliminary' activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday

> at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. The principles for determining hours worked within the 'workday' proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act, which is concerned with this question only as it relates to time spent outside the 'workday' in activities of the kind described in section 4." 29 C.F.R. § 790.6(a) (footnotes omitted).

Second, the regulations clearly elaborate the definition of the term "workday" in the Portal-to-Portal Act as follows:

> "'Workday' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the 'workday,' and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked." 29 C.F.R. § 790.6(b) (footnotes omitted).

Finally, after stating that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity," the regulations explain that "[a]mong the activities included as an integral part of a principal activity are those

closely related activities which are indispensable to its performance." 29 C.F.R. § 790.8(b) & (c) (footnotes omitted).[4]

(4) Against that background, the sum and substance of § 4(a)(1), as Senator Cooper explained, is to provide that "[w]alking, riding, or traveling time to the place where the principal activities are performed [is] eliminated as a principal activity" so that "clearly and definitely, as to the future, an employee cannot receive compensation [pursuant to the

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[4] Contrary to the First Circuit's suggestions at *Tum* Pet. App. 8a-9a, nothing in the Department of Labor regulations departs from, limits or modifies the regulations' recognition, 29 C.F.R. § 790 6(a), that "periods within the 'workday' [are] unaffected" by the Portal-to-Portal Act. As the Secretary of Labor stated in her *amicus* brief to the First Circuit in support of rehearing in *Tum*, the Department of Labor regulations "adhere to the 'workday' principle" throughout and none of the subsections cited by the First Circuit in its *Tum* opinion, are intended to call for, or can be properly read as calling for, the application of § 4(a) to make noncompensable any employees activity that occurs during the employee's "workday" proper. See Brief For the Secretary of Labor As Amicus Curiae Supporting Petition For Panel Rehearing And Petition For Rehearing En Banc in *Tum v. Barber Foods*, 1st Circuit Nos. 02-1679 & 02-1739, at pp. 7-8 and 10-12.

The Secretary pointed out in this regard that 29 C.F.R. 790.7(q) n.49 "stands for nothing more remarkable than the proposition that the [employee workplace] travel discussed *may* be noncompensable if the [employees'] preceding activity at the washroom or the clothes-changing place is, under the particular circumstances, not considered a principal activity. Sec. Br. at 10-11. The Secretary added that 29 C.F.R. 790.7(d) "does not address employees who must walk *after* performing their first principal activity . . . [but] only describes those situations when commuting time independently would or would not be considered a compensable principal activity, thereby starting the workday" Sec. Br. at 11-12 (emphasis in original). And, the Secretary noted that 29 C.F.R.790.7(g) and 790.8(c) treat with "activities that *normally* or *ordinarily* would not be considered principal active-ties, and thus would be considered "preliminary" or "postliminary" in nature (i.e., outside the purview of the "workday"), Sec. Br. at 12 (emphasis in original).

The Secretary of Labor's interpretation of her own regulation is, of course, entitled to the greatest weight.

FLSA] for any walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. 2297. In other words, as the Court stated in *Steiner v. Mitchell, supra*, employee "activities . . . are compensable under the portal-to-portal provisions . . . if those activities are an integral and indispensable part of the [employee's] principal activities . . . and are not [the 'walking, riding, or traveling' activities] specifically excluded [from the term 'principal activity or activities'] by Section 4(a)(1)." 350 U.S. at 256.

Congress' point in providing in § 4(a)(1) that "an employee cannot receive compensation [pursuant to the FLSA] for any walking, riding, or traveling time to the actual place of performance where he begins his actual activities," 93 Cong. Rec. 2297 (Sen. Cooper), was to preclude any argument that walking at the start of the day to the place where an employee performs the first of his "principal activities" is so integral and indispensable to the employee's ability to perform that first activity that the walking itself must be regarded as a "principal activity."

If "walking, riding, or traveling" at the start of the day to the place where an employee performs the first of his "principal activities" had not been singled out in § 4(a)(1) as not being a "principal activity," this argument would have had force. This is so because the Portal-to-Portal Act defines "principal activity or activities" as including "closely related activities which are indispensable to [a principal activity's] performance." But this argument would have resurrected in a new guise the holding in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946), that "time necessarily spent by the employees in walking to work on the employer's premises, following the punching of time clocks, was working time within the scope of [FLSA] § 7(a)." And, since a primary purpose of the Portal-to-Portal Act was to overrule *Mt. Clemens Pottery* with respect to "walking to work," the

language of § 4(a) was drafted so as to clearly and definitely put that argument to rest and to do so in a manner that makes it plain that § 4(a)(1), like § 4(a)(2), has no application to employee workplace activity that occurs during the employee's "workday" proper.

(5) In *Alvarez*, the petitioner-employer argues that, in § 4(a)(1), Congress went far beyond overruling the "walking to work" holding of *Mt. Clemens Pottery* and instead made noncompensable under the FLSA employee "walking that occurs *between* [the place of performance of an] 'integral and indispensable activity' and the work station." Pet. 13 (emphasis added). This reading of § 4(a)(1) runs roughshod over the language that Congress crafted and enacted to make it clear that the provision is to have *no* application to employee activity during the "workday" proper.

Section 4(a)(1) simply can*not* be read to say that employers are privileged to treat as noncompensable under the FLSA employee "walking, riding, or traveling" during the course of the workday *between* "place[s] of performance of . . . principal . . . activities." What § 4(a)(1)'s language does say, and what Congress intended it to say, is that employers are so privileged with regard to employee "walking, riding, or traveling *to* . . . the [first] actual place of performance of the]employee's] principal activity or activities" at the beginning of the workday and "*from*" the last such place at the end of the workday, 29 U.S.C. § 254(a)(1) (emphasis added). Nothing in § 4(a)(1) provides any predicate for the proposition that the provision applies to "walking, riding, or traveling" during the "workday" proper.

By the same token, the *Alvarez* petitioner-employer's effort to rest its reading of § 4(a)(1) on the *Steiner* opinion runs roughshod over that opinion's language.

As we have noted, *Steiner* defines the § 4(a) term "principal activity or activities"—and thus the range of activities compensable under the FLSA—as follows:

> "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." 350 U.S. at 256.

The *Alvarez* petitioner-employer would read the foregoing not as an elucidation of the meaning of the § 4(a) term "principal activity or activities" but as an elucidation of the term "walking, riding or traveling" and as if the *Steiner* Court had stated:

> "activities performed [during an employee's workday] . . . are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the [employee's] principal activities . . . and are not [the walking, riding, or traveling] specifically excluded [from being compensable] by Section 4(a)(1)."

That rendering of the *Steiner* opinion has nothing to do with the opinion the *Steiner* Court wrote. It restates what the Court said so as to put the opinion into direct conflict with § 4(a)(1)'s statutory language and with the Congressional intent clearly expressed in § 4(a)(1)'s language to make non-compensable *only* employee "walking, riding, or traveling to . . . the [first] actual place of performance of the principal activity or activities" at the beginning of the "workday" and "from" the last such place at the end of the "workday" and not employee workplace "walking, riding or traveling" during the "workday" proper.

B. As we have emphasized, § 4(a)'s statutory language states in clear terms that its provisions have no application to

employee activity during the "workday" proper—the period of time that begins when an employee "commences" his "principal activity or activities" and continues until the employee "ceases" his "principal activity or activities"

In contrast, "[t]he language of Section 4 is not free from ambiguity," *Steiner*, 350 U.S. at 254, with regard to what employee activities come within the statutory term "principal activity or activities."

But *Steiner* and its companion case, *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956), fill out the meaning of that statutory term and do so in a manner that clearly establishes that the meat processing employees here are engaged in their "principal activity or activities" when they engage in the workplace donning of their required personal protective equipment and sanitary garb and when they engage in the workplace doffing of that equipment and garb.

(1) The "precise [Portal-to-Portal Act] question" in *Steiner* was:

> "[W]hether workers in a battery plant must be paid as a part of their 'principal' activities for the time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in [plant] facilities which state law requires their employer to provide." 350 U.S. at 248.

The Court answered that question "yes." Based on the language of § 4(a) read in the context of the Portal-to-Portal Act as a whole and its legislative history, the Court

> "conclude[d] that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities

> for which covered workmen are employed and are not specifically excluded by Section 4(a)(1).
>
> We find no difficulty in fitting the facts of this case to that conclusion because it would be difficult to conjure up an instance where changing clothes and showing are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." 350 U.S. at 256.

(2) While *Steiner* speaks clearly for itself, we would be derelict if we failed to note two aspects of the Senate legislative materials the *Steiner* Court set out in the appendix to its opinion as providing particular support for its statement "that the Senate intended the activities of changing clothes and showering to be within the protection of the [Fair Labor Standards] Act if they are an integral part of and are essential to the principal activities of the employees," 350 U.S. at 254, and for the Court's holding.

First, elaborating on the Senate Report's explanation that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof," S. Rep. No. 48, p. 48, Senator Cooper stated "it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity." 93 Cong. Rec. 2297.

Seeking clarification as to the definition of this critical statutory term, Senator McGrath asked Senator Cooper:

> "Am I correct in understanding the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day's work?" 93 Cong. Rec. 2297.

Senator Cooper then confirmed Senator McGrath's understanding. *Id.* at 2297-98.

See Steiner, 350 U.S. at 256-257.

Second, in their colloquy Senators Cooper and McGrath made it clear that the term "principal activity or activities" covers employee activities indispensable to the employee's performance that take a short time as well as those that take a longer time. In this regard Senator Cooper began by reciting two examples of "principal activities" from the Senate Report. The second example involved "a garment worker . . . who is required to report 30 minutes before other employees" and during that time "distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees." This prompted the following series of questions and answers:

> "Mr. McGrath. Is there any significance to the use of the words 'thirty minutes'? * * *
>
> "Mr. Cooper. No; there was no definite purpose in using the words 'thirty minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes.
>
> "Mr. McGrath. Then we can clear that point up by reiterating that what the committee means is that any amount of time spent in the performance of the type of activity expressed in examples 1 and 2 is to be hereafter regarded as compensable time.
>
> "Mr. Cooper. I should certainly say so, as a part of the principal activity." 93 Cong. Rec. 2298.

See Steiner, 350 U.S. at 257-258 (omitting the two next to last portions in this exchange).

(3) *Steiner's* holding formed the predicate for the Court's companion decision in *Mitchell* v. *King Packing Co.*, *supra*, which concerned "knifemen [who] perform[ed] various butchering operations . . . in the killing room and . . . in the cutting room" of "an interstate meat packer" who "[we]re required to sharpen their own knives outside [i.e. before or after] the scheduled shift of eight hours . . . in a room [in the plant]

equipped by [their employer for that purpose] . . ." 350 U.S. at 262.

The Portal-to-Portal Act question in *King* was "whether the knife-sharpening activities of the employees . . . are within the[] classification" of "principal activities," as defined in *Steiner*. 350 U.S. at 262. The Court answered that question "yes."

Noting that "[a]ll of the knives . . . must be 'razor sharp' for the proper performance of the work," 350 U.S. at 262, the Court concluded that "the knifesharpening activities of these workmen are an integral part of and indispensable to the various butchering activities for which they were principally employed and that they must be compensated for by [the employer] in compliance with the Fair Labor Standards Act as amended by the Portal-to-Portal Act, and as construed in *Steiner v. Mitchell*," *id.* at 263.

(4) Taken together, *Steiner* and *King* clearly establish that the workplace donning of required protective equipment and sanitary garb by the meat processing employees here at the beginning of their shift and the workplace doffing of that equipment and garb at the end of their shift are among their "principal activities" within the meaning of § 4(a) of the Portal-to-Portal Act. These employees are "compelled by circumstances, including vital considerations of health and hygiene," *Steiner*, 350 U.S. at 248—that are reflected in mandatory federal health and safety standards and in their employer's rules—(i) to don personal protective equipment and sanitary garb at the plant's donning locations before proceeding directly to the plant's killing or cutting floors; and (ii) on leaving the killing or cutting floor for the day to doff that equipment and garb at the plant's doffing locations. Thus, like the employees' workplace clothes changing and showering activities at issue in *Steiner* and the employees' knife sharpening activities at issue in *King Packing*, the employees' workplace those donning and doffing activities here are "an

integral and indispensable part of the principal activity of their employment," 350 U.S. at 256.

Of equal moment, the employees' workplace donning activities constitute the first of their "principal activities" on any given workday, and the employees' doffing activities constitutes the last of their "principal activities" for that workday[5]. It follows that engaging in that donning activity marks the beginning of the employees' "workday," and that engaging in that doffing activity marks the end of that "workday." That being so, the employees' walking from the plant's donning locations to the plant's killing or cutting floor and their walking from the killing or cutting floor to the plant doffing locations at issue here occurs during the employees "workday" proper and is beyond the reach of the Portal-to-Portal Act.

II. THE *TUM* "WAITING TIME DURING THE DONNING AND DOFFING PROCESS" ISSUE

In *Tum* the employer provides: that at the beginning of their shift its poultry processing employees are to don their required personal protective equipment and sanitary garb in the plant's hallway leading off the plant's entrance (and exit) along which is arranged an equipment cage, coat racks and equipment bins; and (ii) that at the end of their shift the employees are to doff their equipment and garb at the same plant location. In the donning process the employees must procure the required items from the employer at the equipment cage window, coat racks and equipment bins. And in the doffing process the employees must turn in to the employer the required items they had obtained in the donning process. *See Tum* Pet. App. 3a-4a. Given the employer's arrangements for the donning and doffing processes "[e]mployees may have to

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[5] As we explain in Part II, infra, the donning activity in question often entails a number of successive steps, including steps necessary to procuring the equipment and garb from the designated locations at the plant.

wait to obtain and dispense with clothing and equipment. At busier times, there may be lines at the coat racks, glove liner bins, and [equipment] cage window . . .". *Id.* at 4a.

The Portal-to-Portal Act question thus presented is whether § 4(a) privileges the employer to treat the waiting time spent by the employees in obtaining required personal protective equipment and sanitary garb from the employer, and in returning that equipment and garb, as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."

This Court's decision in *Steiner v. Mitchell*, *supra*, provides the starting point for analysis. *Steiner*, as we have emphasized, settles the critical, but still abstract, proposition that such employee workplace activities as "changing clothes at the beginning of the shift and showering at the end" that are "an integral and indispensable part of the principal activities for which the covered workmen are employed" are compensable under the FLSA as "principal activities." *See* 350 U.S. at 248 and 256. It is also very much to the point here that at a more concrete level *Steiner* establishes that it is "the time incident to [such] changing of clothes and showering", *id.* at 248, which in that case "was found to come to 30 minutes a day . . . for each employee," *id.* at 251, that is compensable under the FLSA. It could not be otherwise.

The descriptive phrase "changing clothes at the beginning of a shift" does not describe an instantaneous event—it describes an active process in which the employee takes a series of successive steps over time dictated by the nature of the task and by the nature of the employer's arrangements for the clothes changing process and the nature of the employers' clothes changing facility. Thus, an employee engages in the "principal activity" of "changing clothes" by going through a clothes changing process—*viz.* by taking the successive steps, and by spending the time on each, necessary to accomplish the required clothes changing task. That being so, as *Steiner*

recognizes, the FLSA makes compensable the time the employee spends taking the steps necessary to accomplish the "principal activity" task at hand—*viz.* the "time incident" to accomplishing that task.

The employee waiting time at issue in *Tum* is "time incident" to their donning and doffing of required personal equipment and sanitary garb and as such is compensable under the FLSA. The employer has arranged the donning and doffing processes, and structured the donning and doffing locations, so that a necessary step in the donning process is for the employee to "obtain [required] clothing and equipment" from the employer and a necessary step in the doffing process is for the employee to "dispense with [that] clothing and equipment" by returning it to the employer. And the employer has done so in a manner that may require the employee to have to wait his turn in lines at the employer's equipment points in order to obtain required items and in order to return required items. That "waiting" time "is incident" to the donning and doffing process just as surely as the time the employee spends in taking physical possession of the required items and as the time spent in the physical return of those items.

Indeed, the "waiting time" and the "obtaining time" do not measure two separate steps in the donning process, nor do the 'waiting time' and the "returning time" measure two separate steps in the doffing process. The necessary step to accomplishing the donning task of obtaining the required items is a single step that begins when the employee seeks to obtain the item and continues until the employee obtains possession of the item. And, that necessary step is part and parcel of the overall donning process. It cannot possibly be considered to be a Portal-to-Portal Act "preliminary activity" separate from the "principal activity" of donning the required protective equipment and sanitary garb. The same is true of the single step of returning the required items which cannot be con-

sidered to be a "postliminory activity" separate from the "principal activity" of doffing the required protective equipment and sanitary garb.

CONCLUSION

The judgment of the First Circuit in *Tum*, case no. 04-66, should be reversed, and the judgment of the Ninth Circuit in *Alvarez*, case no. 03-1238, should be affirmed.

Respectfully submitted,

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